

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR
Arbitration Appeal No.19 of 2017

Shail Shrivastava, D/o. J.P. Shrivastava, aged about 52 years, R/o Near Ayappa Temple Raipur Road, Bilaspur, Tehsil & District Bilaspur (CG)

---Appellant

Versus

Magma Fincorp Limited, 24 Park Street Kolkata 700016, Through (Branch Manager), Branch Office, Rajendra Nagar, Bilaspur, Tahsil & District Bilaspur (CG)

---Respondent

For Appellant	:	Mr.Anoop Mazumdar, Advocate
For respondent	:	Mr.Sunil Otwani, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

22/06/2018

1. In a arbitral proceeding rendered between the appellant and the respondent herein, the award was passed by sole Arbitral Tribunal on 15.7.2010 in favour of the respondent herein at Kolkata and thereafter in order to execute the award, execution was levied by the respondent herein on 11.6.2012 at Bilaspur. During pendency of the execution application, the appellant herein filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called as "AC Act") for setting aside arbitral award on 27.11.2012 at Principal Civil Court, Bilaspur, in which the respondent appeared and filed an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (hereinafter called as "CPC") for rejection of said

application stating inter-alia that the Principal Civil Court, Bilaspur has no jurisdiction to consider the application under Section 34 of the AC Act. Learned Principal Civil Court, Bilaspur by its impugned award granted that application filed by the respondent under Order 7 Rule 11 of the CPC and rejected the application filed by the appellant under Section 34 of the CPC. Questioning that order, this arbitration appeal has been filed by the appellant herein under Section 37 (1) (b) of the AC Act.

2. Mr. Anoop Mazumdar, learned counsel for the appellant, would submit that the appellant has already levied execution application under Section 36 of the AC Act before the Principal Civil Court, Bilaspur, therefore, by virtue of the provisions contained in Section 42 of the AC Act, the Principal Civil Court, Bilaspur will have the jurisdiction to entertain the application under Section 34 of the AC Act. Therefore, the impugned order is liable to be set aside and the said Court be directed to consider the application of the appellant on merits in accordance with law. He placed strong reliance of the judgment rendered by the Supreme Court in the matters of **State of West Bengal and others v. Associated Contractors**¹ and **State of Maharashtra through Executive Engineer, Road Development Division No.111, Panvel and another v. Atlanta Limited**².

1 (2015) 1 SCC 32

2 (2014) 11 SCC 619

3. On the other hand, Mr. Sunil Otwani, learned counsel for the respondent would submit that the appellant cannot be allowed to take recourse of Section 42 of the AC Act as Section 42 of the AC Act would not apply in execution application. He relied upon the judgment of the Supreme Court in the matters of **Swastik Gases Private Limited v. Indian Oil Corporation Limited**³, **B.E. Simoes Von Staraburg Niedenthal and another v. Chhattisgarh Investment Limited**⁴, **Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and others**⁵ and **Sundaram Finance Limited represented by J. Thilak, Senior Manager (Legal) v. Abdul Samad and another**⁶.
4. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.
5. The short question for consideration would be whether Section 42 of the AC Act would apply to the execution application filed under Section 36 of the AC Act and that will confer the jurisdiction to the Principal Civil Court where execution application under Section 36 of the AC Act is filed and pending consideration.
6. In order to appreciate the point in dispute, it would be appropriate to notice Section 2(e) and 45 of the AC Act

3 (2013) 9 SCC 32

4 (2015) 12 SCC 225

5 (2017) 7 SCC 678

6 (2018) 3 SCC 622

which states as under:-

“2. Definitions.-(1) In this Part, unless the context otherwise requires,-

(a) to (d) xxx xxx xxx

(e) “Court” means-

(i) in the case of an arbitration other than international commercial arbitration, the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal civil court, or any Court or Small Causes:

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, and in order cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.

(f) to (h) xxx xxx xxx”

7. In the matter of **Associated Contractors** (supra), the Supreme Court has considered Section 2(e) and 42 of the AC Act and laid-down the conclusion as under:-

“25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression “with respect to an

arbitration agreement” makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an Award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be “court” for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil court having original jurisdiction in the district as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.”

The above-stated judgment clearly states that applications mentioned in Section 42 includes application under Section 9 and Section 34.

8. In the matter of **B.E. Simoese Von Staraburg Niedenthal** (supra) the Supreme Court has clearly held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction as neither Section 31(4) nor Section 42 contains a non obstante clause wiping out a contrary agreement between the parties. It was observed as under:-

“11. In a very recent judgment delivered on 10-9-2014 in State of W.B. v. Associated Contractors (supra), the three-Judge Bench (speaking through one of us, Rohinton Fali Nariman, J.), noticing the decisions of this Court in FCI v. A.M. Ahmed & Co.,⁷ (SCC para 6); Neycer India Ltd. v. GNB Ceramics Ltd.⁸ (SCC para 3) with reference to Section 31(4) of the Arbitration Act, 1940 and decisions of this Court in Jatinder Nath v. Chopra Land Developers (P) Ltd.⁹ (SCC para 9); Rajasthan SEB v. Universal Petrol Chemicals Ltd.¹⁰ (SCC paras 33 to 36) and Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. (supra) (SCC para 32), held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction as neither Section 31(4) nor Section 42 contains a non obstante clause wiping out a contrary agreement between the parties. On the basis of the above decisions, it was further held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction.”

9. In the recent judgment in **Sundaram Finance Limited** (supra) the Supreme Court relying upon Section 32 of the AC Act held that Section 42 of the Act would not apply to the execution application. It was observed as under:-

7 (2001) 10 SCC 532

8 (2002) 9 SCC 489

9 (2007) 11 SCC 453

10 (2009) 3 SCC 107

“17. However, what has been lost sight of is Section 32 of the said Act, which reads as under:

“32. Termination of proceedings.”-(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where-

(a) the claimant withdraws his claim, unless the respondent objects to the order and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings; or

(c) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings.”

The aforesaid provision provides for arbitral proceedings to be terminated by the final award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.

18. It is in the aforesaid context that the view adopted by the Delhi High Court in *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*¹¹ records that Section 42 of the Act would not apply to an execution application, which is not an arbitral proceeding and that Section 38 of the Code would apply to a decree passed by the court, while in the case of an award no court has passed the decree.”

10. Reverting to the facts of the present case, vehicle

¹¹ 2009 SCC OnLine Del 511

loan cum hypothecation agreement entered into between the parties has been filed along with memo of appeal. Clause (k) of the said agreement provides for jurisdiction which states as under:-

“(K) JURISDICTION

Courts in Kolkata alone shall have exclusive jurisdiction for the purpose of this agreement.”

11. The Supreme Court in the matters of **B.E. Simoes Von Staraburg Niedenthal** (supra) and **Sundaram Finance Limited** (supra) has clearly held that when there is agreement between the parties, then Section 42 of the AC Act would not be applicable.
12. Following the principle of law laid-down by the Supreme Court in the aforesaid judgments (supra), it is held that since Section 42 of the AC Act is not applicable in the execution application, therefore, the appellant cannot be allowed to rest his application under Section 34 of the AC Act on the basis of levying of the execution at Principal Civil Court, Bilaspur as in the matter of **Sundaram Finance Limited** (supra) Their Lordships have clearly held that enforcement of award can be filed anywhere in country where such decree can be executed and there is no requirement for obtaining a transfer of decree from court which has jurisdiction over arbitral proceedings.
13. Submission of Mr.Mazumdar relying upon the judgment of the Supreme Court in **Associated**

Contractors (supra) is of no help. In **Associated Contractors** (supra) the Supreme Court has held that Section 42 of the AC Act would apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act, but the fact remains that execution is not included in the word application used in Section 42 of the Act. Thus, two judgments cited by Mr. Mazumdar are not applicable to the facts of the present case and clearly distinguishable.

14. As a fall-out and consequence of the aforesaid discussion, I do not find any jurisdictional error in the impugned order warranting interference by this Court in exercise of power under Section 37(1) (b) of the AC Act. Accordingly, the arbitration appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K. Agrawal)
JUDGE

B/-